The costs of all parties must be paid out of the Fund.

Order accordingly.

Solicitors: *Drew & Napier; Cooma, Lau, Loh & Karthigesu; Oehlers & Choa.*

A MALAYSIAN REPORTS

LEE SOH HUA v. KOW LUP PIOW & ORS.

B [F.C. (Lee Hun Hoe C.J. (Borneo), Hashim Yeop A. Sani & Syed Agil Barakbah F.JJ.) September 28 & November 22, 1983; March 13, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 18 of 1982]

C *Contract – Sale of Land – Subdivision of land approved subject to compliance with conditions – Whether conditions had to be complied with by the vendor – Question of fact – Finding by trial judge upheld by appellate court.*

Evidence – Admission of oral evidence to vary written agreement – Evidence Act 1950, s. 92

D In this case the appellant was the registered owner of certain lands in Seremban and the respondents were the developers. The appellant had applied for sub-division of the lands and this had been approved subject to compliance with certain conditions. The appellant agreed to sell the land to the respondents. The appellant contended that the respondents knew of the conditions imposed for the sub-
E division of the land and their liability for all expenses for the works. The respondents on the other hand maintained that they did not know of the conditions at the time of the agreement. The learned trial judge after a lengthy trial arrived at the conclusion that both the options and the agreement contained categorical assertions that the appellant had already obtained approval for the subdivision of her land. He accepted the evidence of the respondents that
F they only knew of the three conditions some seven months after the signing of the agreements. The respondents had told the appellant that the responsibility for satisfying the conditions rested with her under the agreement. The learned trial judge granted specific performance of the agreement and awarded $50,000 as damages. The appellant appealed.

G **Held,** the learned judge in this case was faced with two different stories and he accepted the story of the respondents as true. The appellate court was not justified in reversing the decision of the trial judge and the appeal should therefore be dismissed.

H *Cases referred to:*

(1) *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.* [1979] 2 M.L.J. 229.

(2) *Tan Swee Hoe Co. Ltd.* v. *Ali Hussain Bros.* [1980] 2 M.L.J. 16.

(3) *Tan Chong & Sons Motor Co. Sdn. Bhd.* v. *Alan Mcknight* [1983] 1 M.L.J. 220, 229.

I (4) *Tan Siew Gaik* v. *Loke Poh Seong* [1978] 2 M.L.J. 171, 172.

(5) *Lebai Taib* v. *Abdul Ghani & Anor.* [1973] 1 M.L.J. 109.

FEDERAL COURT.

Raja Abdul Aziz Addruse (*Wong Weng Kwai* with him) for the appellant.

James Ponniah (*Soo Lim Pang* and *Ibrahim bin Ismail* with him) for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This is an appeal against the decision of the learned Judge in granting specific performance and awarding $50,000 as damages.

The appellant/defendant was the registered owner of certain lands in Seremban and the respondents/plaintiffs were developers. In March 1967 approval was given for sub-division of her lands subject to compliance with certain conditions which involved considerable finance. So, she left the matter in abeyance. Then in 1974 she again applied to the Collector of Inland Revenue, Encik Haron Awal (P.W.6) for sub-division through her surveyor Tuan Haji Mydin. The layout plans were sent to various departments for comments. In March, 1975 the Seremban Town Council met and accepted the recommendation of its Engineer, Lim Heng Shea (P.W. 4) that the layout plans be approved subject to the following three conditions:–

1) that an approach road of not less than 20 feet should be constructed from Jalan Rasah, Seremban, to the said lands;
2) that a proper layout plan showing the main roads, lanes and main drains should be submitted for approval by the relevant authorities;
3) that the construction of the main roads, lanes and main drains should be in accordance with the approved plans.

By a letter dated May 3, 1975 Mr. Lim informed P.W. 6 that the layout plans were approved subject to the said three conditions. According to P.W.6 a summary of all comments were sent to the Commissioner of Lands and Mines on June 13, 1975. The latter minuted his approval on the file on September 13, 1975 in these words:–

"The subdivision is approved. But the question of alienation of Government State land will be dealt with by a separate exercise."

Nothing was said about the three conditions. On the same day the Commissioner endorsed his approval of the plans with the word "diluluskan". A letter dated September 20, 1975 was sent to the Town Council with two copies of the plan for endorsement. A copy of the letter was sent to the appellant's surveyor. Lim replied on September 30, 1975 that he would not endorse the plans until the three conditions specified in his earlier letter had been fulfilled.

Appellant's husband admitted in evidence that he was given a copy of the minute dated September 13, 1975 by Yacob bin Ibrahim (P.W.7) the Clerk of the Municipality two or three days after the minute was written. It is also the respondents' contention that the appellant and her surveyor also knew of the minute. The appellant and her husband were therefore under the impression that the approval for sub-division was not subject to the three conditions. There was therefore no reason for appellant's husband to discuss about the three conditions with the respondents. So, sometime after September 13, 1975 appellant issued an option to be valid up to September 23, 1975. According to the respondents the "diluluskan" plan was attached to the option. On the other hand, appellant said it was not so but that it was attached later. It is the respondents' case that because of the "diluluskan" plan they did not inquire further into the matter. The result is that on September 22, 1975 the parties entered into an agreement whereby the respondents agreed to buy and the appellant to sell the lands for $700,000 of which $150,000 was paid on the execution of the agreement. The balance was to be paid by two instalments. The first sum of $150,000 was to be made on or before November 15, 1975 and the remaining sum of $400,000 within one month after the respondents were informed in writing of the issuance of the subdivisional titles by the proper registering authority. The first instalment of $150,000 was paid on November 11, 1975. The sub-divisional titles could not be issued because the Town Council insisted on compliance with the three conditions. The respondents denied they knew anything about the three conditions until April 31, 1976 when they were officially informed by the appellant of them. On the other hand, the appellant maintained that the respondents knew of the three conditions before executing the agreement. She said that they agreed orally to comply with the three conditions. Hence, she entered into the agreement. For this reason she sought for admission of such evidence under section 92 of the Evidence Act. The learned Judge ruled against the admissibility of such evidence under section 92 on the ground that it was an attempt to vary the agreement.

Eight days after the agreement, that is, on September 30, 1975 Lim, as mentioned earlier, informed P.W.6 that the Council was not going to endorse the plan as the three conditions imposed were not complied with. As this was a departmental correspondence no copy was given to the appellant so she did not know of the situation. She still believed the three conditions were shelved.

Clause 11 of the agreement provides that:—

"The vendor shall take all steps and sign all documents necessary for the early issue of subdivisional titles of the said lands according to the layout plan annexed hereto."

The responsibility of the appellant is clear but as the learned Judge found she conveniently forgot it. By a letter dated September 7, 1976 the appellant terminated the agreement on the ground that no drainage plans were submitted to the Council for approval. The appellant takes the view that Clause 11 does not require her to take steps in regard to the three conditions but merely steps to sign documents. The appellant said that there is no possibility of the respondents having seen the "diluluskan" plan. It was submitted that the learned Judge started on the wrong basis when he relied heavily on Clause 11. He took the view that the appellant had not taken any step to do anything. He had not taken into account many matters. The reason for the delay on the part of the respondents was the lack of money. Excuse of the three conditions was merely an afterthought. It is appellant's contention that the termination is lawful. The appellant submitted that the learned Judge did not exercise his discretion judicially in granting specific performance. In support *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.*[1] was cited. On the other hand, the respondents submitted that even if the learned Judge was wrong the alleged breaches did not allow the appellant to forfeit the $300,000 but at most entitled him to damages. However, it was their submission that the learned Judge was justified in his finding of facts on the evidence and documents.

Because of the impasse the respondents decided to call a meeting and engaged a consultant. The consultant thought there was no need to have the signature of the owner on the plan. It seems that he was wrong. Apparently, the practice was for the owner of the land to sign the plan. The point is that the respondents did submit the plan. In his evidence Yacob (P.W.7) admitted receiving the letter with the plan as he initialled and wrote the date July 9, 1976. He found the land owner's signature was not on the plan. So, he kept the plan aside to get the owner to sign as he knew appellant's husband as the land was owned by the appellant. Anyway, he sat on the matter until the first respondent went to enquire about the matter. It was then that he put the plan into the file where the letter was kept and stamped the date October 4, 1976 and passed it to Lim. There is little doubt that P.W.7 was helping the appellant. He was working hand in hand with the appellant's husband. It cannot be disputed that the Council received the letter with the plan on July 9, 1976 which was two months before the termination of the agreement by the appellant. At the time the appellant's husband and the appellant did not know that it was necessary for the owner of the land to sign the plan. This could be seen from the correspondence, particularly the second paragraph of the letter dated August 24, 1976 from appellant's solicitors which states that:—

"..... Till date no plans as aforesaid have been sent to our client for signature resulting in inordinate delay in the issue of the qualified titles. Since time is of the essence your clients are in serious breach of the said Agreement."

Certain facts were disputed. First, with regard to the plan the respondents say they saw the plan with the "diluluskan" so they did not enquire further into the matter. On the other hand, the appellant says that the plan was not attached to the option but was later attached and it was not one with the "diluluskan". Appellant says the best witness would be the respondents' solicitor. He could explain why the "diluluskan" plan was not attached to the agreement. No blame can be attached to the solicitor. He is bound by the agreement and his lips are sealed. Secondly, appellant's husband maintained that Clause 9 of the agreement covers the said three conditions. It reads:—

"..... all expenses incurred for the development and improvement of the said lands, for the purchase of any adjoining state land, construction of roads, lanes, drains, culvert, etc. and the issue of titles to the subdivisional lots of the said lands and the costs of survey with effect from the date hereof shall be borne and paid by the Purchasers, but the Purchasers shall pay to the Vendor on the date of completion of this sale all deposits paid by her to the Private Surveyor, HAJI MAIDIN BIN ABDUL MANAP hencetofore in respect of the subdivision of the said lands according to the layout plan hereto annexed."

Appellant contended that Clause 9 shows that the respondents knew of the said three condi-

tions as it is the implementation provision of the said three conditions. It was submitted that Clause 9 provides the liabilities for the respondents to carry the said three conditions. There is therefore no variation of Clause 9 by the introduction of the three conditions. Clause 9 is not new but merely a carry over from the option. Appellant cited *Tan Swee Hoe Co. Ltd.* v. *Ali Hussain Bros.*[2] and also referred to in Law of Evidence by Woodroffe and Ameer Ali (13th Edition) 1975, Volume 2 page 1925. It is the submission of the appellant that the respondents knew of the three conditions and their liability for all the expenses for the works. The respondents maintained they did not know of the said three conditions at the time of the agreement. They knew of the said three conditions on receipt of a letter dated April 21, 1976. The issue is whether the respondents knew of the three conditions at the time of executing the agreement. As to Clause 9 the learned Judge considered that nothing in that clause related to the three conditions. He observed that:–

"..... These three conditions were not minor ones. They involved a great deal of work and expenditure and it is utterly difficult to comprehend that such important matters would simply be left out of a formal agreement of purchase and sale involving a large and expensive piece of land."

Thirdly, the admissibility of the oral evidence has been dealt with by the learned Judge. In support the appellant cited *Tan Chong & Sons Motor Co. Sdn. Bhd.* v. *Alan McKnight*[3] and *Tan Siew Gaik* v. *Loke Poh Seong*[4] which followed *Lebai Taib* v. *Abdul Ghani & Anor.*[5] Admissibility of oral evidence is not automatic. Each case must be decided according to its own particular facts. The learned Judge has given careful consideration to the matter and ruled against its admissibility under section 92 of the Evidence Act. He summed up his impression of the appellant in these words:–

"..... The defendant appeared to have taken the three conditions lightly and as Mr. James Ponniah submitted she might well have formed the impression that the conditions would no longer be applicable. It seems to me very likely that the defendant deliberately kept back this information from the plaintiffs so as not to jeopardise her plan to sell the land at the price of $700,000.00 to the plaintiffs and leaving the plaintiffs later on to face the problem themselves. Now the defendant was trying to bring in oral evidence in an attempt to vary the terms of the written agreement which in my view is fairly complete and exhaustive in its terms. In the circumstances therefore I was of the view that under sections 91 and 92 of the Evidence Act such oral evidence was inadmissible."

We agree with the learned Judge for the reasons he gave that such evidence could not be admitted on the facts of this particular case. It is difficult to imagine not specifically mentioning such important matter as the fulfilment on the said three conditions in the agreement. In considering the totality of the evidence including the documents it does indicate that the respondents did not know of the said three conditions. In fact, it shows that appellant knew of the three conditions as early as 1967 but in 1975 she thought the said three conditions were not necessary to be complied with in the light of the minute of the Commissioner for Lands and Mines and the letter dated September 20, 1975 to the Council. The respondents made clear that they would not have offered to pay such price if they knew of the said three conditions. When a contract has been reduced to the form of a document section 91 of the Evidence Act excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless otherwise expressly provided in the Act. Also, section 92 of the said Act excludes oral evidence for the purpose of contradicting, varying, adding to or subtracting from such terms.

Having gone through a fairly lengthy trial the learned Judge arrived at the conclusion that both the options and the agreement contained categorical assertions that the appellant had already obtained approval for the sub-division of her land. He held the assertions to be patently false because the authorities had already notified the appellant through her surveyor that she had to comply with the three conditions before approval could be given for subdivision. He accepted the evidence of the respondents that they only knew of the three conditions on April 21, 1976, some seven months after the signing of the agreement. At any rate the respondents by letter dated April 26, 1976 told the appellant that the responsibility for satisfying the three conditions rested with her under Clause 11 of the agreement. The learned Judge made clear that he accepted the evidence of the respondents that had they known about these three conditions they would not have offered $700,000 because they would have to expend a large sum of money to comply with the three conditions.

The learned Judge was faced with two different stories – the appellant's version and the respondents' version. He had to decide which was the truthful one. Very much depends upon the credibility of the witnesses in view of the conflicting evidence. We did not have the same opportunity

as the learned Judge in seeing and hearing the witnesses and assessing their credibility. He accepted the story of the respondents as true. He has approached the matter cautiously and we cannot say he has not directed himself correctly. This is not a sort of case that an appellate court is justified in reversing the decision of the trial Judge by substituting its own view of the facts for that of the trial Judge. We do not think we should interfere with his finding. We would therefore dismiss the appeal with costs. Deposit to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Mah-kok & Din; Stanley Ponniah, Ng & Soo.*

LOH HOLDINGS SDN BHD v. PEGLIN DEVELOPMENT SDN BHD & ANOR.

[F.C. (Wan Suleiman, Seah & Mohamed Azmi F.JJ.) January 5 & February 23 to 25 1983; April 21, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 74 of 1982]

Contract – Sale of land – Specific performance – Inducement of breach of contract – Direct and indirect interference – Res Judicata

Torts – Inducement of breach of contract – Direct and indirect interference

Practice and Procedure – Application to strike out claim – Res judicata – R.H.C. 1980, O. 18 r. 19.

In this case the appellant had entered into an agreement with the shareholders of the 1st respondent company for the purchase of land belonging to the company. He brought an action for specific performance of the contract and also brought an action against the respondents alleging that by entering into an agreement for the sale of the land from the 1st respondent to the 2nd respondent, they induced a breach of the contract of sale between the appellant and the shareholders of the first respondent. The respondents applied to strike out the appellant's claim against them and the learned trial judge gave judgment for the respondents. He found (1) *res judicata* and issue estoppel against the appellant and "that no cause of action could be successfully maintained" against the respondents (b) there was no evidence to indicate a breach of the agreement on the part of the respondents. The appellants appealed.

Held: allowing the appeal: (1) Under Order 18 rule 19 of the Rules of the High Court pleadings will only be struck out in plain and obvious cases. So long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out;

(2) in this case the 2nd respondent by entering into the agreement with the 1st respondent must have intended to cause the 1st respondent to commit breach of the implied covenant that it would not part with the land so long as the agreement between the appellant and the shareholders was still subsisting. Breach of the implied covenant is an unlawful act and forms an unlawful element according to the alternative test of indirect interference;

(3) the doctrine of *res judicata* should not be applied in this case as the cause of action and the issues are different.

Cases referred to:

(1) *Greig* v. *Insole* [1978] 1 W.L.R. 302, 332, 340.
(2) *Thomson & Co. Ltd* v. *Deakin* [1952] Ch. 646, 678,681.
(3) *H.L. Bolton (Engineering) Co. Ltd.* v. *T.J. Graham & Sons Ltd* [1957] 1 Q.B. 159, 172.
(4) *Mooney* v. *Peat Marwick Mitchell & Co.* [1967] 1 M.L.J. 87.
(5) *Rediffusion (Hong Kong) Ltd.* v. *Attorney-General of Hong Kong* [1970] A.C. 1136.
(6) *Gilford Motor Co.* v. *Horne* [1933] Ch. 935.
(7) *Jones* v. *Lipman* [1962] 1 W.L.R. 832.
(8) *Connors Ltd.* v. *Connors* [1940] 4 All E.R. 179.
(9) *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] 2 Ch. 106, 138.
(10) *Doshi* v. *Yeoh Tiong Lay* [1975] 1 M.L.J. 85.
(11) *Syarikat Eastern Plastics Industry* v. *Syarikat Lam Seng Trading* [1972] 1 M.L.J. 21.
(12) *Carl-Zeiss-Stiftung* v. *Rayner & Keeler Ltd.* [1966] 2 All E.R. 536.
(13) *Yat Tung Investment* v. *Dao Heng Bank* [1975] A.C. 581.
(14) *Brisbane City Council* v. *Attorney-General* [1979] A.C. 411.

FEDERAL COURT.

Raja Abdul Aziz Addruse (*Tan Chee Lan* with him) for the appellant.

R.R. Chelliah (*J. Gurusamy* and *Dennis Xavier* with him) for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): It will be necessary to set out in some detail the pre-history leading up to the present appeal so as to enable us to better understand the issues at stake.

We shall be referring to the parties in Malacca High Court Civil Suit No. 111 of 1980 in the same order in which they were referred to therein.

Defendants 1, 2, 3 and 4 held shares in the 5th defendant company (first respondent in the present appeal). 5th defendant had a piece of land known as Holding No. 236, Mukim Berendam, Malacca, which formed the principal asset of the